A **BALARE JABU & ORS**

v.

MERAWA SDN BHD & ORS

B COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA
[CIVIL APPEAL NO: Q-01-84-2008]
C 17 MARCH 2011

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Appeal against - Native customary rights - Declaratory orders - Limitation - Serious and substantial issues raised - Whether not a plain* D *and obvious case for recourse to summary process - Rules of the High Court 1980, O. 18 r. 19*

LIMITATION: *Striking out action on ground of time bar - Suit for declaration - Whether limitation not an answer to suit, action or* E *proceeding for declaratory orders*

This was the appellants' appeal against the decision of the High Court allowing the respondents' application under O. 18 r. 19 Rules of the High Court 1980 to strike out the appellants' writ and statement of claim. The respondents submitted that the F appellants' writ and statement of claim was time barred since the Director of Forests of the State of Sarawak, a public officer, acted in accordance with written law when he issued the licence under the Forest Ordinance and was protected by s. 2(a) Public Authorities Protection Act 1948. The appellants, although G conceding that they were caught by limitation since they did not file their writ and statement of claim within three years, contended that the judge had erred as they had also sought declaratory orders that the issuance of the licence was subject to native customary rights and the 2nd and 3rd respondents, in issuing the H licence, were in breach of their fiduciary duty.

Held (allowing the appeal, and setting aside the order of the High Court)
Per Abdul Wahab Patail JCA delivering the judgment of the I **court:**

(1) While limitation appears to be a complete answer to a suit, action or proceeding for remedy, it is no answer to the same for declaratory orders. A declaration whether the issuance of

a licence was subject to native customary rights and whether the 2nd and 3rd respondents were in breach of a fiduciary duty pertaining to the appellants' constitutional rights, to know whether they had been wronged, was not purely academic. It is now trite that native customary rights are recognised in common law, and the cases involving them have either succeeded or failed based upon the facts and the evidence in respect of disputed facts placed before the courts in support of the assertions made in the respective statements of claim. It was, therefore, clear that there were serious and substantial issues raised that needed to be addressed. It was not a plain and obvious case for recourse to the summary process. (paras 10-12)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu-perayu terhadap keputusan Mahkamah Tinggi membenarkan permohonan responden-responden di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan writ dan pernyataan tuntutan perayu-perayu. Responden-responden menghujah bahawa writ dan pernyataan tuntutan perayu-perayu dihadkan oleh masa disebabkan Pengarah Perhutanan Negeri Sarawak, seorang pegawai awam, bertindak menurut undang-undang bertulis apabila beliau mengeluarkan lesen di bawah Ordinan Perhutanan dan dilindungi oleh s. 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948. Perayu-perayu, walaupun mengakui bahawa mereka tertangkap oleh had masa kerana mereka tidak memfailkan writ dan pernyataan tuntutan mereka dalam masa tiga tahun, menghujah bahawa hakim telah khilaf kerana mereka juga telah menuntut perintah-perintah deklarasi bahawa pengeluaran lesen tersebut tertakluk kepada hak-hak adat resam dan responden-responden kedua dan ketiga, dalam mengeluarkan lesen tersebut, telah melanggar kewajipan fidusiari mereka.

Diputuskan (membenarkan rayuan, dan mengenepikan perintah Mahkamah Tinggi)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Meskipun had masa nampaknya seumpama jawapan penuh kepada guaman, tindakan atau prosiding bagi remedi, ia bukanlah jawapan kepada yang sama bagi perintah-perintah deklarasi. Suatu deklarasi sama ada pengeluaran suatu lesen

tertakluk kepada hak-hak adat resam dan sama ada responden-responden kedua dan ketiga telah melanggar kewajipan fidusiari mereka berkenaan dengan hak-hak perlembagaan perayu-perayu, untuk mengetahui sama ada kesalahan telah dilakukan terhadap mereka, bukanlah sekadar akademik sahaja. Ia sekarang mantap bahawa hak-hak adat resam diiktiraf dalam common law, dan kes-kes melibatkan mereka sama ada berjaya atau gagal berdasarkan fakta-fakta dan keterangan berhubungan dengan fakta-fakta yang dipertikaikan yang dikemukakan di hadapan mahkamah-mahkamah untuk menyokong penegasan-penegasan yang dibuat dalam pernyataan-pernyataan tuntutan masing-masing. Oleh itu, ia jelas bahawa terdapat isu-isu serius dan substantial dibangkitkan yang perlu ditimbangkan. Ia bukanlah suatu kes jelas dan nyata bagi penggunaan proses penghakiman terus.

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***

Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 FC ***(refd)***

Madeli Salleh v. Superintendent of Lands and Surveys & Anor [2005] 3 CLJ 697 CA ***(refd)***

Nor anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 HC ***(refd)***

Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543 HC ***(refd)***

SR Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Kementerian Kesihatan Malaysia & Ors [1997] 2 CLJ 564 CA ***(refd)***

Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Teh Guan Teik v. Inspector-General of Police & Anor [1998] 3 CLJ 153 FC ***(refd)***

Legislation referred to:

Constitution of Sarawak, art. 39
Federal Constitution arts. 153, 161A
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 18 r. 19
Specific Relief Act 1950, s. 41

For the appellants - Baru Bian (See Chee How with him); M/s Baru Bian
For the respondent - Tan Thiam Teck; M/s The Law Firm
For the 2nd & 3rd respondents - Datuk JC Fong, State Legal Counsel (Yap Khan Kee with him)

[Appeal from High Court Miri; Civil Suit No: 22-21-2007 (MR)]

Reported by Suresh Nathan

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellants Balare Jabu & 4 Ors appealed against the decision of the High Court in Miri to allow with costs the defendants' application under O. 18 r. 19 of the Rules of the High Court 1980 PU(A) 50/1980.

[2] The respondents had relied upon O. 18 r. 19 to strike out the plaintiffs' writ and statement of claim on the grounds they disclosed no reasonable causes of action; or it is scandalous, frivolous or vexatious; or it is otherwise an abuse of the process of the court.

[3] Datuk JC Fong acting for the 2nd and 3rd respondents set out their grounds with his usual directness, precision and clarity. He submitted the plaintiffs' writ and statement of claim filed only on 13 April 2007 is time barred since the Director of Forests of the State of Sarawak, a public officer, acted in accordance with written law when he issued the licence under the Forest Ordinance on 30 March 1992 and is protected by s. 2(a) of the Public Authorities Protection Act 1948 (Revised 1978) Act 198.

[4] Mr. Tan Thiam Teck for the 1st respondent submitted that s. 2(a) of the Public Authorities Protection Act is mandatory.

[5] Mr. Baru Bian candidly informed the court that per *Nor anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769 and *Madeli Salleh v. Superintendent of Lands and Surveys & Anor* [2005] 3 CLJ 697 CA, the appellants were caught by limitation since they did not file their writ and statement of claim within three years. However, he submitted, the learned judge had erred as the appellants had also sought declaratory orders that the

issuance of the licence was subject to native customary rights, and in issuing the licence, the 2nd and 3rd respondents were in breach of their fiduciary duty. He relied upon *SR Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Kementerian Kesihatan Malaysia & Ors* [1997] 2 CLJ 564 CA, *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44 FC and *Teh Guan Teik v. Inspector-General of Police & Anor* [1998] 3 CLJ 153 FC that applications for declaratory orders are not subject to limitation.

[6] As to breach of fiduciary duty, the appellants relied upon art. 153 and art. 161A of the Federal Constitution, art. 39 of the Sarawak Constitution and *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543.

[7] Even though they may be barred by limitation from commencing an action by way of a writ and statement of claim to seek damages and compensation, the plaintiffs have not omitted to seek declarations and such further relief and have not therefore run afoul of the proviso to s. 41 of the Specific Relief Act 1950 (Revised 1974) Act 137.

[8] The fundamental question that the court must consider is the O. 18 r. 19 application. It must refrain from deciding upon the merits, and will consider the arguments above only for the purpose of deciding whether there are *bona fide* serious questions to be tried. Or, to put it another way, whether or not it is plain and obvious that the plaintiffs' writ and statement of claim discloses no reasonable cause of action; or it is scandalous, frivolous or vexatious; or it is otherwise an abuse of the process of the court. Datuk JC Fong relied upon *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 FC. In that case the Federal Court declared:

> We need not go further than to refer to the judgment of this Court in *Tio Chee Hing & Ors. v. Government of Sabah* [1980] 1 LNS 124; [1981] 1 MLJ 207 where this Court referred to the Court of Appeal decision in *Riches v. Director of Public Prosecutions* [1973] 2 AER 935 which decided that where it is clear that the defendant was going to rely on the statute of limitations and there was nothing before the Court to suggest that the plaintiffs could escape from it, the claim would be struck out.

[9] We addressed our minds to whether there is anything to suggest the plaintiffs can or cannot escape from the operation of limitation.

[10] While limitation appears to be a complete answer to a suit, action or proceeding for remedy, it is no answer to a suit, action or proceeding for declaratory orders. A declaration whether the issuance of a licence is subject to native customary rights and whether the 2nd and 3rd respondents were in breach of a fiduciary duty pertaining to constitutional rights of the appellants, to know whether they have been wronged or not, is not purely academic. Even if it is without orders for compensation or damages, it serves the purpose of providing some solace to the appellants. And they have only their trust to rely upon that the government is committed to and will do what is right. We do not think such trust is misplaced for no legitimate government intends to act unfairly or unjustly *per se* or in breach of its subjects' constitutional rights. Injustice or unfairness happens only by mistake or unintended error which a true government will seek to remedy without necessity of an order for compensation and damages.

[11] It is now trite that native customary right is a right recognised in our common law (see *Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 FC). The cases involving native customary rights have either succeeded or have failed based upon the facts and the evidence in respect of disputed facts placed before the courts in support of the assertions made in the respective statements of claims. The fact that there are two broad types of native customary rights: (a) statutory native customary rights acquired and granted under the provisions of the land legislation, and (b) historical native customary rights recognised and existing from before the coming into being of the land legislation, the Federal Constitution and the State Constitution, and the implications thereof, as well as the nature of the historical native customary rights on the lands, whether it includes what is below and above the land, add up to the conclusion there are serious and substantial issues that require much research and meticulous preparation, not only on law but also research of history in order to make possible a decision that is not arbitrary but one that is fair and just. Native customary rights themselves exist in different forms such as individual and

A communal rights. A shared right is perhaps no less a right than individual right for it may be a collective right of the tribe or village.

[12] It was, therefore, plain to us that there were serious and substantial issues that has been raised need to be addressed, by more complete pleadings perhaps, with particulars to enable the issues to be addressed fairly, and the discovery and interrogatories processes of the trial process to check and verify disputed facts and evidence. It is not a plain and obvious case for recourse to the summary process (see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC per Mohamed Dzaiddin SCJ).

[13] Accordingly, and having read and heard both written and oral submissions made on behalf of the parties, we allowed the appeal, set aside the order of the High Court and ordered costs in the sum of RM20,000 each here and below to be paid by the respondents.